Supreme Court, U.S.
FILED
MAY 2 - 2005
OFFICE OF THE CLERK

No. 04-1157

IN THE

Supreme Court of the United States

STEVEN A. ODOM; MARK GERGEL; HENSLEY E. WEST; MARTIN D. KIDDER; STEPHEN J. CLEARMAN,

Petitioners,

v.

PEDRO YANG; CAROL JACKSON; PETER S. KELSCH, on behalf of themselves and all persons similarly situated; JAMES BARBERIAN; JOSEPH KINOSIAN; KAREN KINOSIAN; JASON THOMPSON; RAYMOND T. CRUMP,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

J. DAVID DANTZLER, JR.
J. TIMOTHY MAST
TROUTMAN SANDERS LLP
Bank of America Plaza
600 Peachtree Street, N.E.
Suite 5200
Atlanta, GA 30308
(404) 885-3314

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
MICHAEL C. SOULES
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

May 2, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY IN SUPPORT OF PETITION FOR CERTIORARI	1
I. THIS COURT SHOULD RESOLVE THE CIRCUIT CONFLICT ON THE SCOPE OF *AMERICAN PIPE* TOLLING	1
II. THE DECISION BELOW CONFLICTS WITH THE PURPOSES OF THIS COURT'S TOLLING RULE	5
III. THE COURT SHOULD RESOLVE THIS RECURRING QUESTION AND ENSURE THE UNIFORM ADMINISTRATION OF RULE 23	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Amchem Prods., Inc. v. *Windsor*, 521 U.S. 591 (1997) 7
American Pipe & Constr. Co. v. *Utah*, 414 U.S. 538 (1974) 1, 6
Basch v. *Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998) 3
Catholic Soc. Servs., Inc. v. *INS*, 232 F.3d 1139 (9th Cir. 2000) 2, 4
Crown, Cork & Seal Co. v. *Parker*, 462 U.S. 345 (1983) 3, 5, 9
Griffin v. *Singletary*, 17 F.3d 356 (11th Cir. 1994) 2, 5, 10
Korwek v. *Hunt*, 827 F.2d 874 (2d Cir. 1987) 3
McKowan Lowe & Co. v. *Jasmine, Ltd.*, 295 F.3d 380 (3d Cir.), *cert. denied sub nom. Arthur Andersen, LLP* v. *Berger*, 537 U.S. 1088 (2002) 4, 7, 9
Robbin v. *Fluor Corp.*, 835 F.2d 213 (9th Cir. 1987) 3
Salazar-Calderon v. *Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985) 2, 3, 8

SCHOLARLY AUTHORITY

Case Note, 116 Harv. L. Rev. 2230 (2003) 5

OTHER AUTHORITIES

Manual for Complex Litigation (Fourth) (2004) 6, 9
5 James W. Moore, *Moore's Federal Practice* (3d ed. 2004) 2

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

I. THIS COURT SHOULD RESOLVE THE CIRCUIT CONFLICT ON THE SCOPE OF *AMERICAN PIPE* TOLLING.

Plaintiffs *say* that there is no conflict among the circuits on the question whether the statute of limitations should be tolled for "would-be class members who file a class action following the denial of class certification due to Rule 23 deficiencies of the class representative," App. 12a, but their actions speak louder and more candidly than their words. As plaintiffs acknowledge,

> [a]fter class certification was denied in the Georgia Action, Plaintiffs here chose to file a new case in the District of New Jersey, . . . where *McKowan [Lowe & Co.* v. *Jasmine, Ltd.*, 295 F.3d 380 (3d Cir. 2002)] controls, rather than taking on the added burden of challenging the continuing validity of *Griffin* [v. *Singletary*, 17 F.3d 356 (11th Cir. 1994)] in the Eleventh Circuit." [Opp. 10 n.2.]

Plaintiffs and plaintiffs' class-action attorneys plainly recognize that the legal rules in the Third and Eleventh Circuits conflict. Equally important, the Third Circuit recognizes that the circuits are in conflict, stating that whatever it decided, its decision would "inevitably break from some Circuits' treatment of the issue." App. 12a.

Plaintiffs are correct that the circuits unanimously agree that, as a general rule, *American Pipe* does not allow a plaintiff to file a second class action following a definitive determination that class certification under Federal Rule of Civil Procedure 23 is inappropriate. See *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538 (1974). But, the circuits clearly are in conflict about whether there is an exception to the general rule if class certification is denied based on the

inadequacy of the class representative. In the decision below, the Third Circuit held that *American Pipe* tolls the statute of limitations for a second or third or even fourth class action if class certification is denied based on the deficiencies of the class representative. In *Griffin* v. *Singletary*, the Eleventh Circuit rejected precisely that argument, refusing to toll the statute of limitations in a second class action when the first class action was denied due to the inadequacy of the class representative. 17 F.3d 356, 359 (11th Cir. 1994).

In addition, the First, Second, Fifth, Sixth and Ninth Circuits have held that *American Pipe* forbids "piggyback[ing] one class action onto another" for tolling purposes, *Salazar-Calderon* v. *Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985), with no suggestion that this rule comes with a caveat that it does not apply if certification was denied based on the class representative's inadequacy. See Pet. 10-15. And, numerous district courts have concluded that the prohibition on piggybacking applies to class actions denied based on the class representative's inadequacy. *Id.* at 14 n.2. Finally, like the Third Circuit itself, the principal treatises and other commenters have concluded that the courts of appeals are in conflict. See, *e.g.*, 5 James W. Moore, *Moore's Federal Practice* § 23.65[1][b] (3d ed. 2004), and other authorities cited at Pet. 15-16.

Indeed, plaintiffs do not dispute that the legal rules announced by the courts of appeals are in conflict. Instead, plaintiffs say: (i) most of the cases can be distinguished from this case on their facts, (ii) *Catholic Social Services, Inc.* v. *INS*, 232 F.3d 1139 (9th Cir. 2000) (en banc), supports the decision below, and (iii) *Griffin* might be overturned by the Eleventh Circuit on reconsideration.

Initially, plaintiffs' hope that the courts of appeals will eventually adopt exceptions to the announced definitive legal rule barring piggybacking is misguided. In each case, the court of appeals explains its decision to preclude

piggybacking in terms that make clear no such exception would be permitted.

In *Salazar-Calderon*, the court of appeals relied on Justice Powell's concern that the *American Pipe* tolling rule "is a generous one, inviting abuse," see *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 354 (1983) (Powell, J., concurring), in forbidding piggybacking that might "toll the statute of limitations indefinitely." *Salazar-Calderon*, 765 F.2d at 1351. Similarly, in *Korwek* v. *Hunt*, 827 F.2d 874 (2d Cir. 1987), the court refused to toll the statute of limitations for a new class action, because the proposed extension of *American Pipe* "would be inimical to the purposes behind statutes of limitations and the class action procedure." *Id.* at 879. The Ninth Circuit, too, feared that extending *American Pipe* would be "'abusive.'" *Robbin* v. *Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987). And, the First Circuit refused to adopt an approach that would allow plaintiffs to "stack one class action on top of another and continue to toll the statute of limitations indefinitely." *Basch* v. *Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998).

In each of these cases, the court's analysis makes clear that, if class certification were denied based on the inadequacy of the representative, the court would *not* expand the already generous tolling rule of *American Pipe* and permit indefinite tolling and the accompanying distortion of the purposes of having a limitations period. Instead, these courts would embrace the obvious option of requiring another class member to intervene in the initial class action and take the place of the inadequate representative. See Pet. 22. This would allow a single court to address the Rule 23 inquiry in a single case, serving the efficiency concerns addressed by *American Pipe* and Rule 23 and preventing both forum shopping and the serious damage to the interest of repose caused by stop-and-start statutes of limitation and the

piggybacking and stacking of cases.[1] *In any event*, nothing in the courts' announcement of a blanket prohibition on piggybacking suggests any qualification.

Second, plaintiffs' assertion that *Catholic Social Services, Inc.* v. *INS*, 232 F.3d 1139 (9th Cir. 2000) (en banc), supports the Third Circuit decision (Opp. 9), if correct, would only deepen the conflict among the circuits that plaintiffs seek to obscure. Plaintiffs, however, are wrong. The Ninth Circuit clearly stated that it would not certify a second class action that was "no more than an attempt to relitigate the correctness of the earlier class certification decision." 232 F.3d at 1147. In *Catholic Social Services*, however, the court found that the legislature had altered the criteria necessary to permit a plaintiff to have standing to bring a claim at issue against the INS, and therefore that the second action was not simply an attempt to circumvent the denial of certification in the first suit. See *id.* at 1149 (the first class was properly certified and then narrowed "for reasons unrelated to Rule 23 certification"). *Catholic Social Services* in no way supports the Third Circuit rule that a plaintiff may file a second class action in a different forum in an attempt to locate a court that will find a class representative adequate.

Finally, plaintiffs' stated belief that *Griffin* may be confined to its particular circumstances (Opp. 10) is belied

---

[1] Plaintiffs seem to argue that because this Court denied the petition for certiorari in *McKowan Lowe & Co.* v. *Jasmine, Ltd.*, 295 F.3d 380 (3d Cir.), *cert. denied sub nom. Arthur Andersen, LLP* v. *Berger*, 537 U.S. 1088 (2002), this Court should also deny the petition here. Opp. 9. Even leaving aside that denials of petitions have no precedential value, that contention would clearly be wrong. In *McKowan*, after the court concluded that class certification could not be granted due to an inadequate representative, the court allowed an absent class member to intervene in the same action and seek class certification. Here, the court allowed plaintiffs to engage in forum shopping by permitting them to attempt to obtain class certification from a different court with the attendant problems of inefficiency, delay and the stacking of actions.

not only by their own decision to decamp from the Eleventh Circuit to file their second class action, but also by the language of the holding which plaintiffs fail to quote in full. The court expressly holds that plaintiffs may not "engage in endless rounds of litigation . . . over the adequacy of successive named plaintiffs to serve as class representatives," because that could "toll the statute of limitations indefinitely." 17 F.3d at 359 (quotations omitted). And, as noted, treatises, commenters, and the Third Circuit itself (App. 12a) view the decision below as a "clear split from the Eleventh Circuit's opinion in *Griffin*." Case Note, 116 Harv. L. Rev. 2230, 2233 (2003).

This Court should grant the petition to resolve the conflict among the courts of appeals on this important issue.

II. THE DECISION BELOW CONFLICTS WITH THE PURPOSES OF THIS COURT'S TOLLING RULE.

As explained in the petition, the decision below is incompatible with this Court's reasoning in *American Pipe* and *Crown, Cork & Seal*. Pet. 16-18. These decisions do not contemplate the repeated tolling of statutes of limitations for successive cases involving class claims. Rather, the decisions permit tolling only for "individual actions in the event that class certification is denied." *Crown, Cork & Seal*, 462 U.S. at 346-47. Neither the language nor the rationale of these decisions suggests that the statute of limitations should be tolled a second (and potentially a third and fourth) time for class claims.

Plaintiffs implicitly concede that *American Pipe* and *Crown, Cork & Seal*, by their terms, sanction the tolling only of individual claims. Plaintiffs insist, however, that adhering to this boundary is "inimical to the Court's basis for creating the tolling rule." Opp. 12. Specifically, plaintiffs claim that this Court "concluded that the tolling rule must be read to eliminate 'every incentive to file a separate action prior to the

expiration of [each absent class member's] own period of limitation.'" *Id.* (alteration in original) (quoting *Crown, Cork & Seal*, 462 U.S. at 351). It is plaintiffs who have misunderstood the premises and the dual interests underlying the rules announced in *American Pipe* and *Crown, Cork & Seal*. In those decisions, this Court crafted an equitable rule that "is consistent both with the procedures of Rule 23 *and with the proper function of the limitations statute*." *American Pipe*, 414 U.S. at 555 (emphasis supplied). The tolling rule represents a balance between Rule 23's interest in the "efficiency and economy of litigation," *id.* at 553, and a statute of limitations' goal of repose. Plaintiffs have simply jettisoned the latter purpose, distorting the rationale of *American Pipe* and *Crown, Cork & Seal* to create the appearance that the decision below can be reconciled with this Court's precedent. Moreover, the relitigation of the class certification question in successive cases in different courts does not truly serve Rule 23's efficiency interests.

Guided by their misunderstanding of the premises of *American Pipe* and *Crown, Cork & Seal*, plaintiffs also argue that reversing the Third Circuit "would create a strong incentive for class members to file separate duplicative class actions or to intervene as class representatives in the pending action prior to the class certification decision." Opp. 12 (emphasis omitted). This is clearly wrong.

Initially, the general rule that the limitations period is not tolled for successive class actions does not create a "strong incentive" to file duplicative actions, because if the class representative is deemed inadequate, "courts generally allow class counsel time to make reasonable efforts to recruit and identify a new representative who meets Rule 23(a) requirements." *Manual for Complex Litigation (Fourth)* § 21.26, at 277 (2004). Similarly, under the liberal rule espoused in *McKowan*, for example, tolling would even be permitted where an intervenor sought to replace an inadequate representative after the denial of certification, so long as "the

class has [not] been . . . definitively rejected." 295 F.3d at 382. In short, the problem identified by plaintiffs – that a class representative's inadequacy should not eliminate the class vehicle for all class members – is entirely solved by allowing the intervention of another class member to act as class representative in the same suit, without the inefficiency, forum shopping, stop-and-start limitation periods and stacking of actions that the Third Circuit decision authorizes.

In any event, as an empirical matter, plaintiffs' fears are unfounded. Numerous courts have long refused to toll the statute of limitations for subsequent class claims, and plaintiffs present no support for the notion that the judiciary has been inundated with a flood of protective filings prompted by concerns that a class representative might be inadequate.

For similar reasons, the possibility of intervention assuages any concern that the "denial of class certification because of the deficiency of one proposed class representative would be the equivalent of dismissal" in a case otherwise appropriate for class treatment. Opp. 13. Another class member who intervened in the action would serve as the representative of an otherwise meritorious class. In contrast, the Third Circuit's expansive rule would severely undermine the interest of repose served by statutes of limitations and invite forum shopping by plaintiffs unsatisfied with a court's certification decision. For these reasons, the Third Circuit's broad expansion of the tolling rule is unnecessary to protect "'the rights of groups of people who individually would be without effective strength to bring their opponents into court,'" *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 617 (1997), particularly in light of its substantial detrimental consequences for the administration of statutes of limitations and the efficient adjudication of class claims.

III. THE COURT SHOULD RESOLVE THIS RECURRING QUESTION AND ENSURE THE UNIFORM ADMINISTRATION OF RULE 23.

Plaintiffs dispute the recurring nature of this issue, notwithstanding the thousands of class actions filed in district courts each year, by asserting that there are few reported circuit decisions addressing the issue. The fact that *seven* courts of appeals have been compelled to address this issue demonstrates both its frequent recurrence and its importance in class-action litigation. In addition, numerous district courts have wrestled with this question over the years. See, *e.g.*, Pet. 14 n.2. The question has been percolating for sufficient time to warrant this Court's resolution of the conflict among the circuits and federal district courts.

Curiously, plaintiffs also argue that, far from allowing class plaintiffs to stack successive class actions, the Third Circuit's "holding . . . is exactly the opposite." Opp. 14. But plaintiffs support this argument by focusing on the NACT subclass – the one subclass whose dismissal was *affirmed*. Petitioners agree that this subclass was properly dismissed for lack of numerosity, but the disposition of the NACT subclass has no bearing on this petition, which seeks review of the decision *reversing* the district court's dismissal of the other two subclasses on statute of limitations grounds. Plaintiffs do not seriously dispute that the Third Circuit's decision would permit "putative class members [to] piggyback one class action onto another and thus toll the statute of limitations indefinitely." *Salazar-Calderon*, 765 F.2d at 1351.

Plaintiffs also take issue with petitioners' observation that the Third Circuit's rule is administratively unworkable. Though conceding that "in some cases there may be no 'bright line between the test for an adequate representative and the test for the propriety of class certification,'" Opp. 15 (quoting Pet. 22-23), plaintiffs blithely dismiss this concern by claiming that the opinion in *Amchem* reveals that the Court believed that there was also a defect in the class itself. But

plaintiffs offer no answer to the broader point – that district courts denying class certification "may not always make it clear whether their rulings rest on representative- or class-based defects." App. 30a (Alito, J., dissenting). Indeed, as this case demonstrates, in many instances a court might deny class certification without even identifying the exact defect. See, *e.g.*, *id.* at 81a-82a. And what of cases in which the court simply errs in identifying the provision of Rule 23 that is grounds for denial of class certification? These practical problems will only grow more acute as the Third Circuit becomes a magnet for putative class "actions in which courts in other circuits have denied class certification." *Id.* at 30a (Alito, J., dissenting).

Finally, plaintiffs quarrel with petitioners' observation that there is already a means for curing an inadequate class representative, namely, that class counsel may "recruit and identify a new representative who meets the Rule 23(a) requirements." *Manual for Complex Litigation* § 21.26, at 277; see also *McKowan Lowe*, 295 F.3d at 382 (tolling the statute of limitations for an intervenor who seeks to replace an inadequate class representative "where the class has neither been certified nor definitively rejected"). Plaintiffs acknowledge that "permitting intervention of a new proposed class representative is certainly one possible choice" for protecting an otherwise suitable class, Opp. 15, yet they nonetheless demand a broader rule – despite its substantial detrimental consequences for the administration of Rule 23 and for the sensible enforcement of statutes of limitations. And, plaintiffs' sole authority for this expansive rule – *Crown, Cork & Seal* – is inapposite, because that case only concerned tolling for "individual lawsuits," 462 U.S. at 353, not for a succession of class actions.

The decision below thus represents a significant departure from *American Pipe* and its progeny. The tolling rule, with its well-crafted balance between the efficiency goals of Rule 23 and the interest in repose served by statutes of limitations,

would be upset if class counsel could "engage in endless rounds of litigation . . . over the adequacy of successive named plaintiffs to serve as class representatives." *Griffin*, 17 F.3d at 359. By contrast, replacing an inadequate class representative with another class member through intervention, and allowing the same court to determine whether the inadequacy of the initial class representative can be cured, effectively preserves the efficiency goals of Rule 23. In this way, the problem that the Third Circuit purportedly addressed – preventing plaintiffs from filing "duplicative protective actions in order to preserve their rights," App. 25a – is resolved. There is no good reason to expand the tolling rule to allow plaintiffs to bring entirely new class actions long after a statute of limitations has expired, and there are many good reasons not to do so. The Third Circuit's rule, with its potential severely to undermine the salutary purposes of statutes of limitations, should not be permitted to stand.

This Court should, accordingly, grant review to address and resolve the conflict among the courts of appeals and to establish a uniform tolling rule for class actions that will serve Rule 23 and the interests protected by statutes of limitations, and prevent forum shopping and successive class actions.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

J. DAVID DANTZLER, JR.
J. TIMOTHY MAST
TROUTMAN SANDERS LLP
Bank of America Plaza
600 Peachtree Street, N.E.
Suite 5200
Atlanta, GA 30308
(404) 885-3314

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
MICHAEL C. SOULES
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

May 2, 2005